Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-730

ANGELO A. PAPA,
Petitioner,
v.
DAVID FAWCETT, FRED BAKER,
ALLEGHENY COUNTY BOARD OF ELECTIONS,
and MARK WOLOSIK, DIRECTOR,
ALLEGHENY COUNTY BOARD OF ELECTIONS,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, to review its judgment of June 21, 2001, at Nos. 800, 801, and 802 WAL 2000, denying allowance of appeal from the Order of the Commonwealth Court of Pennsylvania, issued December 6, 2000 at No. 3238 C.D. 1999, No. 3248 C.D. 1999, and No. 702 C.D. 2000.

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COUNTERSTATEMENT OF THE CASE

This appeal arises out of an election contest. Petitioner Angelo Papa is the lawyer who initiated the action on behalf of his client, David Christopher, after Christopher lost his primary election bid for the Republican nomination to County Council for Allegheny County, Pennsylvania. Official election results showed Respondent, David Fawcett received 20,129 votes; Christopher received 19,539.

Christopher then sued Fawcett, the Allegheny County Board of Elections, and the Director of the County Division of Elections. The gravamen of Christopher's case was that the unofficial election results on election night showed him to be a narrow winner, but the official results issued shortly thereafter showed that he narrowly lost the nomination to Fawcett.

Christopher's complaint was dismissed after hearing. In the meantime, a court-ordered recanvass sought by plaintiff verified the results (net gain in Fawcett's favor of eight (8) votes) and showed no sign of wrongdoing or election irregularities. The dismissal of Christopher's complaint was upheld by Pennsylvania's Commonwealth Court. That dismissal is final and not at issue at this juncture of the proceedings.

After the dismissal of the underlying action, both the County and Fawcett petitioned the Court for an award of fees against the disappointed loser and his counsel. Mr. Fawcett's petition, insofar as it related to Petitioner, Mr. Papa, the disappointed loser's counsel, arose out of: the baseless legal positions taken by Petitioner; the admission that no factual evidence existed to support the counts in the complaint against Respondent; the numerous procedural violations committed

during the litigation; and the fact that Petitioner was pursuing invalid causes of action in the same procedurally-defective manner he had followed recently in an unrelated piece of election litigation -- litigation which contained identical claims, allegations, correspondence, pleadings and which was found by Pennsylvania's Commonwealth Court to be groundless and procedurally defective.

The Statement of the Case ("Statement") contained within Mr. Papa's Petition for Writ of Certiorari ("Petition") contains material misstatements of the procedural history of this matter, and it creates misimpressions as to what occurred in the courts below. The Statement also makes several very material omissions.

First, the Statement implies that Attorney Papa and his client were simply seeking to obtain information and directly represents that the election recanvass ordered by the trial court was not relief even sought by the plaintiff at the trial court level. This is not so. In fact, the disappointed losing candidate, through his counsel, filed a Complaint in Equity and a Petition for Special Relief against the Respondent's which did not simply seek information. To the contrary, the pleadings included a specific request for damages against Fawcett and it contained requests for recanvassings, including a request for a recanvass of all election districts within the County. (Complaint in Equity and Petition for Special Relief, Counts IV and VI (G.D. No. 99-8590).)

Petitioner's Statement also erroneously represents that the trial court awarded counsel fees to the County Board of Elections and the other defendants. This is not true. Although Allegheny County incurred the cost of conducting a recanvass and although the county law department was forced to defend against this frivolous action, the County's petition for recovery

of counsel fees and costs was denied. (12/9/99 Memorandum Opinion (per McLean, A.J.); Petition, p. 29.) The trial court only assessed the fees incurred by Fawcett, based upon a number of factors, including but not limited to the "general disregard of statutorily mandated procedures" and the fact that there was well-established proof that the Petitioner and his client had absolutely no factual or legal basis for bringing a lawsuit for damages against the winning candidate. (Id., pp. 29-30.)

Finally, throughout the Petition for Certiorari, it is claimed that the Petitioner had no notice of any request for attorneys' fees against him personally and it is implied that the award of fees against him was issued without a hearing. This is not so.

The motions for counsel fees of both the County and Fawcett specifically sought an award of fees against plaintiff and his counsel. Then, in briefs filed in support of the motion, case law and argument was submitted on this very issue -- the propriety of an award of fees against a party's counsel. Following the filing of these motions and briefs, the trial court duly set a time and place for the hearing, and a two-day hearing on the issue of attorneys' fees -- both against Mr. Papa and his client -- was held. With these filings, and in the context of clear Pennsylvania precedent wherein counsel for parties have been sanctioned and held jointly and severally liable with their clients for obdurate and vexatious conduct in cases they were handling (without a separate action being filed), Attorney Papa certainly had due notice that fees might be assessed against him personally for his litigation misconduct.

ARGUMENT

There are very good reasons to deny the pending Petition for Certiorari.

A. The Record of the Proceedings Below is Very Poor Because of Petitioner's Repeated Disregard of Procedural Rules.

It would be extremely difficult for this Court to assess the merits of Petitioner's grounds for appeal because of Petitioner's failure to properly brief this matter below and because of Petitioner's repeated disregard of procedural rules at both the trial court level and in the appellate courts below.

Pennsylvania's Election Code contains very specific procedures for complaints arising out of elections. Although the Petitioner is a lawyer with special expertise and experience in election litigation under Pennsylvania law, Petitioner repeatedly violated procedures at the trial level and on appeal.

Indeed, the trial court listed thirteen (13) specific statutory and procedural violations which it characterized as "a blithe disregard of the specific procedural burdens which [Petitioner and his counsel] bear under [Pennsylvania's Election] Code." (12/9/99 Memorandum Opinion, per McLean, A.J.; Petition, pp. 27-28.)

On appeal, the Pennsylvania Commonwealth Court also expressed a similar disdain towards Petitioner's disregard of procedures in the appeal arising out of the dismissal of Petitioner's complaint as well as the separate appeal arising out of the trial court's award of fees. The Commonwealth Court sanctioned Petitioner for this conduct, and stated as follows:

> We note that this [numerous failures to comply with the Rules of Appellate Procedure] is a repetition of what occurred in the first appeal. . .

(12/6/2000 Memorandum Opinion, per Leadbetter, J.; Petition, p. 16.) Indeed, the Commonwealth Court characterized Petitioner's filings in that court as "replete with violations of the appellate rules," and as a result had "no hesitation" in finding the Petitioner's conduct was "obdurate and vexatious" and constituted "not an isolated instance, but a consistent pattern." (Id. at p. 17.)

Among the appellate rules disregarded by the Petitioner in the appellate courts below was a failure to support factual allegations with citations to the record and a failure to specify the manner and the place in the record at which issues were preserved. (Id. at 16-17.) Because of Petitioner's failure to cite to the record, and because of Petitioner's failure to accurately summarize what occurred below, there is no "clean record" which would permit this Court to properly understand and consider the issues raised on appeal.

Further, although Petitioner now attempts to elevate this dispute to an issue arising under the United States Constitution, this was never the focus of the Petitioner's efforts below. In his brief to the Commonwealth Court of Pennsylvania, the Petitioner barely mentioned the purported deprivation of due process. He cited no case law or other authority to support his due process argument. Consequently, the appellate courts below did not discuss the due process arguments. It is respectfully submitted that this Court should not hear appeals of matters which were insufficiently and inadequately briefed by the Petitioners in the appellate courts below.

B. When Properly Stated, the Factual and Procedural History of this Matter Indicate that the Issues Raised by Petitioner are not Worthy of Being Heard by this Court.

The fundamental factual premise of Mr. Papa's Petition is the assertion that Papa, as counsel for the complainant below, had no notice that fees might be assessed against him. This assertion is not to be believed.

First, Papa omits to reveal to this Court that, approximately one year prior to the filing of this action, the Commonwealth Court issued an opinion in an unrelated election case in which he represented the plaintiff (also a disappointed loser) and made the same allegations that were repeated, virtually word-by-word, in this action. In both cases, Mr. Papa authored what the trial court characterized as "overwrought pleadings" setting forth "a staggering litany of alleged wrongdoings by the Elections Department" which were found to be baseless.

Under these circumstances, it is more than a little bit disingenuous for Mr. Papa, an attorney, to now claim a deprivation of due process after being sanctioned for initiating baseless litigation and ignoring procedural rules in exactly the same manner as he had done before. As the trial court noted,

> [Mr. Papa] has been chided by this Court in the past for his scattershot and overbroad approach to election litigation. He has been informed by the Commonwealth Court . . . that many of the actions which he would later repeat in this case were grounds for dismissal. In the course of this case, Mr. Papa repeatedly crossed over the line from zealous advocacy of his own client into unwarranted harassment of his adversaries.

> The constant use of bloated yet substantively empty pleadings and briefs, unsubstantiated claims of wrongdoing and general disregard of statutorily mandated procedure amply justifies an award of counsel fees against Mr. Papa. (12/9/99 Memorandum Opinion; Petition, p. 30.)

It is respectfully submitted that any lawyer must understand that repeated failures to follow procedures and substantive rules may lead to sanctions, including an award of attorneys' fees.

Additionally, in this case, Mr. Papa received notice that fees were being sought against him personally, because the respondents specifically requested such an award and, under well-established Pennsylvania law, an attorney may be held jointly and severally liable for fees where, for example, he knew or should have known his client's claims were without merit. E.g., In re Estate of Liscio, 432 Pa. Super. 440, 638 A.2d 1019 (1994), appeal denied 539 Pa. 679, 652 A.2d 1324.

Finally, it is absurd for Mr. Papa to assert that he has suffered deprivation of his property without due process of law because he was never afforded a hearing. Quite to the contrary, the trial court held a two day hearing on the merits of the award of the attorneys' fees.

In sum, Mr. Papa was afforded due process. He was provided with notice, a hearing and an opportunity to be heard on the issue of whether attorneys' fees should be assessed against him personally.

C. The Petition Should be Denied Because it Does Not Implicate the Reasons Outlined in Rule 10 for Granting Certiorari to a State Court Decision.

The Petition should be denied because the Supreme Court of Pennsylvania chose not to hear Petitioner's appeal. Thus, this matter does not involve a situation as described in Rule 10 of the Supreme Court Rules where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals." (Rule 10(b).)

Similarly, this matter does not involve (and Petitioner has not argued that it involves) a situation where "a state court. . . has decided an important question of federal law that has not been, but should be, settled by this Court" or that conflicts with relevant decisions of this Court. (Rule 10(c).)

D. The Petition Should be Denied Because this Matter Does Not Raise Important Federal or Constitutional Concerns.

This is not a case where broad constitutional questions are implicated. More directly, this is simply a case without any factual basis in which plaintiff's counsel aggressively pursued litigation with a complete and utter disregard for statutes, rules and procedures.

That a lawyer can be sanctioned for his or her assertion of meritless positions and his or her failure to follow procedural rules is not a matter in doubt. Nor is there a split among the circuits (or any other courts) relative to this principle.

The lower courts have written well-reasoned, thoughtful opinions. Those opinions detail the numerous excesses Petitioner engaged in and indicate the sound basis for finding that Petitioner went well-beyond the duty to represent his client zealously.

Thus, for both procedural and substantive reasons, this is not a case worthy of consideration by the Supreme of the United States.

CONCLUSION

Respondent respectfully requests that the Court deny Petitioner's Petition for Certiorari.

Respectfully submitted,

Dated: 12/2/01

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of December, 2001, three true and correct copies of the foregoing **Brief in Opposition to Petition for Writ of Certiorari** were served on counsel for the Petitioner and respondents by U.S. Mail, First Class, postage pre-paid, addressed as follows:

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